

October 16, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Daniel Innamorato

Date of Filing: August 12, 2003

Case Number: TEA-0003

On August 12, 2003, Daniel Innamorato filed an appeal from a tentative cost comparison decision by the DOE's Office of Headquarters Procurement Services ("contracting officer") under the provisions of Office of Management and Budget Circular No. A-76 ("A-76" or "the circular"). For the reasons set forth below, we will deny the appeal.

I. Background

A-76 mandates that federal agencies compare the costs of performing certain "Government operated commercial" activities by the federal government against the costs of contracting out those activities to the "commercial sector." Implementation of the Federal Activities Inventory Reform Act of 1998, 64 Fed. Reg. 33927, 33931 (containing 1999 revision of A-76).¹ The circular further provides that the performance of such an activity should be converted from the government to a contractor, or from a contractor to government, if doing so will result in greater than "marginal estimated savings." *Id.*; see Circular No. A-76 Revised Supplemental Handbook (March 1996) (updated through transmittal memorandum 20, June 1999) [hereinafter Revised Supplemental Handbook] at 28.

An A-76 administrative appeal is a challenge to a cost comparison decision based on asserted errors in the cost comparison process. To be considered an eligible appeal subject to review by the administrative appeal authority, the issues must be raised by eligible appellants and meet criteria established in the Revised Supplemental Handbook (Chapter 3, Subpart K, Appeals of Tentative Waiver and Cost Comparison Decisions).

The cost comparison decision in the present case was made as part of the DOE's "Visual Information Service A-76 Study." The positions under study are currently located in the DOE's Office of Management, Budget and Evaluation, Office of Administration, Office of

¹The most recent revision of A-76, with an effective date of May 29, 2003, is not applicable to the present case. 68 Fed. Reg. 32134 (May 29, 2003) (revised circular applicable to "[c]ost comparisons for which solicitations have not been issued before the effective date.").

Administrative Management and Support, Media Production Group (“the Group”). The Group combines printing, visual information, copier and library services.

Under the procedures set forth in A-76 and the Revised Supplemental Handbook, the agency prepares a performance work statement (PWS), a description of what the Government intends to buy, regardless of the outcome of the cost comparison, setting forth the requirements, performance measures and standards, workload and conditions of performance. The agency also prepares a Government Management Plan, the purpose of which is to develop and identify the organizational structures, staffing and operating procedures, transition and inspection plans, and equipment necessary to ensure that it can perform the activity in an efficient and cost effective manner. One of the documents included in the plan is the Government Most Efficient Organization (MEO), the cost of which is then compared to a single contractor bid chosen from among offerors by the contracting officer.

In this case, the total cost of in-house performance (i.e., by the MEO) was calculated to be \$2,072,151 over five years, whereas the contract bid was \$2,788,225. Thus, the cost comparison decision resulted in the MEO being selected. Daniel Innamorato, a Visual Information Specialist in the Media Production Group, filed the present appeal of the cost comparison decision.

II. Analysis

Chapter 3, Subpart K of the Revised Supplemental Handbook sets forth specific criteria that must be met for an administrative appeal to “to be eligible for review under the A-76 Administrative Appeals process, . . .” Revised Supplemental Handbook at 13. Two of these criteria are particularly relevant to the present case. First, to be eligible, an appeal must “[a]ddress specific questions regarding an agency’s compliance with the requirements and procedures of the Circular [A-76], . . . or address specific questions regarding the costs entered by the Government on the applicable Cost Comparison Form and set forth the rationale for questioning those items.” *Id.* Second, an eligible appeal must “[d]emonstrate that the items appealed, individually or in aggregate, would reverse the tentative decision.” *Id.*

As discussed below, several of the items in Mr. Innamorato’s appeal raise specific questions regarding either the DOE’s compliance with the A-76 procedures or the costs entered on the Cost Comparison Form in this case.² However, Mr. Innamorato’s appeal has not demonstrated that these items, individually or in the aggregate, would reverse the tentative decision, i.e., result in the selection of an outside contractor rather than the in-house MEO. Therefore, the appeal is not “eligible for review” under the A-76 Administrative Review Appeals procedures, and therefore must be denied.

² The appellant also raises an issue that is not appealable in the A-76 Administrative Appeals Process. Mr. Innamorato contends that the function performed by DOE graphics employees is “inherently governmental.” The activities at issue in the present case were identified as commercial activities eligible for competition in the FAIR Act Inventory of 2001. That determination was subject to administrative challenge and appeal by interested parties, but in a process separate from (and at an earlier stage than) the A-76 Administrative Appeals Process. 64 Fed. Reg. at 33930.

Mr. Innamorato raised the following issues regarding the DOE's compliance with the requirements and procedures of A-76:

- (1) A-76 states that "Government performance of a commercial activity is authorized if a cost comparison . . . demonstrates that the Government is operating or can operate the activity . . . at an estimated lower cost than a qualified commercial source." 64 Fed. Reg. at 33932. The appellant contends that this provision "indicates a willingness under A-76 to allow the affected employees to restructure the activities, methods or processes (i.e., create a [MEO]) and reduce governmental costs or cost estimates *prior* to undergoing an A-76 study," but that "[n]o such cost comparison was conducted" in the present case. Appeal at 1.
- (2) The Revised Supplemental Handbook states that A-76 is designed to "provide a level playing field between public and private offerors to a competition" and "encourage competition and choice in the management and performance of commercial activities." Revised Supplemental Handbook at iii. The appellant faults the Visual Information Service A-76 study for "failures to provide a 'clear, transparent and consistent' competition (i.e., a level playing field) by the deliberate disenfranchisement of all affected employees, customers and stakeholders" from participation in the process, and contends that a "flawed preliminary contractor A-76 Study . . . prejudiced any level playing field." Appeal at 1.
- (3) The Visual Information Service A-76 Study did not allow "'full participation' in the development of any performance standards, performance work statements, etc. . . . to affected employees, customers or their representatives." Appeal at 1 (citing Revised Supplemental Handbook at 6 ("affected parties will have the opportunity to fully participate in the development of supporting documents and proposals, including the development of performance standards, performance work statements, management plans, and the development of in-house and contract cost estimates").
- (4) The Revised Supplemental Handbook contemplates the formation of a cost comparison study team that "should document mission requirements and seek new and innovative ways to provide the required products or services" and states that the "participation of functional experts is essential to the quality of the cost comparison." Revised Supplemental Handbook at 10. Mr. Innamorato contends that the "affected employees *would* have been prime 'functional experts' and customers *would* have been instrumental in 'documenting mission requirements' but these stakeholders were excluded from participation." Appeal at 2.
- (5) The PWS developed under the Visual Information Service A-76 study limits service options, "increase[s] the risk that customers will abandon the federal graphics office, and . . . is *not* performance-oriented since it has denied customer participation in helping establish what the performance requirements should be." The PWS also limits options

for providing the required products and services by “specifically limiting office hours and equipment for in-house production, . . .” Appeal at 2 (citing Revised Supplemental Handbook at 11 (PWS should not “limit service options” or “arbitrarily increase risk,” “should be performance-oriented,” and should not “limit[] the options available for providing the required product or service, . . .”)).

- (6) The Revised Supplemental Handbook provides for the establishment of a Source Selection Authority, which reviews contract offers “and identifies that offer which represents the ‘best overall value to the Government.’ This contract offer competes with the Government’s in-house cost estimate.” Revised Supplemental Handbook at 12. In this process, the Government is to ensure “that there are no potential conflicts of interest in the membership of the Authority.” *Id.* The appellant contends that the participation of a particular Visual Information Specialist (Team Leader) constituted a conflict of interest. Appeal at 2.

While expressing no opinion on the merit of any of the above issues, we do find that they, on their face, raise “specific questions regarding an agency’s compliance with the requirements and procedures of” A-76.³

The appeal goes on to “address specific questions regarding the costs entered by the Government on the applicable Cost Comparison Form.” Specifically, the appellant notes that the “Management Plan budget allocates \$82.00 annually for ‘materials and supplies’ and it is questionable whether this could satisfy the Program Mission requirements for any headquarters element . . .” Appeal at 2. The appellant also notes that in the MEO’s in-house cost estimate, “the value entered for the column heading ‘Maintenance’ is zero dollars.” *Id.* at 3.

Nonetheless, Mr. Innamorato’s submission does not meet the necessary criteria to be “eligible for review under the A-76 Administrative Appeals process, . . .” Revised Supplemental Handbook at 13. Nowhere has the appellant attempted to “[d]emonstrate that the items appealed, individually or in aggregate, would reverse the tentative decision.” *Id.* In the present case, a reversal of the tentative decision would result in the selection of the contract bid over the MEO, a result that the appellant does not seek.⁴ Mr. Innamorato points out a number of instances where

³ The appellant raises another issue that does concern compliance with the requirements of A-76, but is not relevant to the present case. The Revised Supplemental Handbook states that an “activity will not be converted to or from in-house, contract or ISSA performance, on the basis of a cost comparison, unless the minimum differential is met.” Revised Supplemental Handbook at 19. This provision is clearly not applicable to this case, where the tentative cost comparison decision was to keep the activity “in-house.”

⁴ Mr. Innamorato proposes that the “flawed Management Analysis, the flawed PWS, the Contractor bid based on a flawed PWS, and the flawed MEO with Team Lead conflict of interest should all be vacated. The study teams responsible for this should be replaced by independent and properly-trained teams and the A-76 Study should be reinitiated, if necessary . . .” Appeal at 4. Mr. Innamorato contends that if this were done the “graphics staff MEO would not only win, it would win without compromising current federal grade levels, responsibilities, work processes, products

he believes the Visual Information Services A-76 study process was flawed. But he does not demonstrate that a correction of the alleged deficiencies would result in a different outcome in the present case. For example, if the errors he alleges in the PWS were corrected (issue (5)), the contractor's bid and the MEO cost presumably would change, but the cost difference between the two likely would not. Similarly, while the appellant questions two of the estimated in-house costs, he does not allege (nor is it conceivably the case) that a more accurate estimation of those two costs ("materials and supplies" and "maintenance") would be more than \$716,156, enough in the aggregate to make the in-house cost higher than the contract cost, and thereby alter the outcome of the cost comparison.

For the reasons set forth above, the appellant's submission is not eligible for review under the A-76 Administrative Appeals process. We will therefore deny the present appeal.

It Is Therefore Ordered That:

- (1) The A-76 Administrative Appeal filed by Daniel Innamorato, Case Number TEA-0003, is hereby denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 16, 2003